Supreme Court, U.S.
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No. 03-7

IN THE

# Supreme Court of the United States

THE REV. DR. MICHAEL A. NEWDOW,

*Petitioner,*

*v.*

THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES; THE STATE OF CALIFORNIA; THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD"); DAVID W. GORDON, SUPERINTENDENT, EGUSD; THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD"); DR. JIM SWEENEY, SUPERINTENDENT, SCUSD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

(2) Whether (in circumstances such as the one at bar) there is a waiver of sovereign and Speech or Debate immunities inherent in the Establishment Clause.

(3) Whether the Petitioner in this case has Article III standing to challenge the Pledge of Allegiance on Establishment Clause grounds.

## PARTIES TO THE PROCEEDING

Rev. Dr. Michael A. Newdow is Plaintiff and Petitioner here. The federal defendants are the United States Congress, the United States of America, and George W. Bush.* The State of California, the Elk Grove Unified School District ("EGUSD"), David W. Gordon, Superintendent, EGUSD, the Sacramento City Unified School District ("SCUSD"); and Dr. Jim Sweeney, Superintendent, SCUSD, were all named as state defendants. The United States Congress, the President, the State of California, SCUSD and Dr. Sweeney were all dismissed as defendants by the Court of Appeals.

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* Pursuant to Rule 35 of the United States Supreme Court, George W. Bush has been substituted for William Jefferson Clinton, his predecessor, who was named originally in his official capacity as President of the United States.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

An amended opinion of the Court of Appeals (on rehearing) was filed on February 28, 2003, and is reported at 321 F.3d 772. (App., 1a-24a).** The original panel opinion (June 26, 2002) is reported at 292 F.3d 597. (App. 28a-58a). Attempts to intervene by the Senate and by the mother of Newdow's child were denied on December 4, 2002, at 313 F.3d 495 (App., 99a-107a) and 313 F.3d 506 (App., 108a-109a), respectively. Newdow's standing as a parent was upheld on that same date at 313 F.3d 500 (App., 89a-98a).

The case was originally heard before a magistrate judge, who, on May 25, 2000, issued Findings and Recommendation that were not reported. (App., 111a-112a). The District Court adopted the Findings and Recommendation on July 21, 2000 (App., 110a).

## STATEMENT OF JURISDICTION

The original judgment of the Ninth Circuit Court of Appeals was entered on June 26, 2002. Rehearing and rehearing *en banc* were denied on February 28, 2003, although an amended opinion was issued at that time. This Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). Justice O'Conner extended the time to file this petition until June 26, 2003.

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** Citations to the Appendix refer to the Appendix provided by the United States of America in its Petition for Certiorari to this Court (Docket #02-1574).

## CONSTITUTIONAL PROVISION, STATUTES AND RULE AT ISSUE

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4 U.S.C. § 4:

> The Pledge of Allegiance to the Flag, "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart.

California Education Code § 52720:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Elk Grove Unified School District Rule AR 6115:

> Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.

## STATEMENT OF THE CASE

The Pledge of Allegiance to the Flag was first created in 1892, in celebration of the 400th anniversary of Columbus's "discovery" of America. After a subsequent half century of widespread unofficial adoption, Public Law No. 622, 56 Stat. 380 (June 22, 1942) took effect, codifying the Pledge of Allegiance to the Flag of the United States of America (hereinafter "the Pledge"), which read:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.

Of note is the fact that there is and was nothing religious in that 1942 version of the Pledge. Twelve years later, however – claiming that, "Our American Government is founded on . . . the belief that the human person is important because he was created by God," H.R. 1693, 83rd Cong., 2nd Sess. (1954), and that "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator," *Ibid.* – Congress amended the Pledge. Thus, in an act that did nothing but add the two purely religious words, "under God," to the preceding prose, Congress altered the Nation's sole Pledge so that it now reads:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

Pub. L. No. 396, 68 Stat. 249 (hereinafter "Act of 1954"). That version of the Pledge is currently codified at 4 U.S.C. § 4.

Petitioner Newdow is a citizen of the United States, entitled to all the protections of the Constitution. He is also an atheist, who adamantly denies the existence of any supreme being, and

who finds the notion that his government espouses the contrary religious view at all – much less as part of its only Pledge of Allegiance – to be deeply offensive and injurious. Accordingly, citing the First Amendment, he filed suit in the United States District Court for the Eastern District of California on March 8, 2000, challenging the current version of the Pledge. Seeking only declaratory and injunctive relief, he asked the district court, among other things, "[t]o declare that Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses of the United States Constitution," and "[t]o demand that Defendant the Congress of the United States of America immediately act to remove the words 'under God' from the Pledge of Allegiance to the Flag as now written." Original Complaint, at 36.

Newdow set out numerous grounds for standing. Chief among these was his personal right to join his fellow citizens in pledging allegiance to his country's flag – and all it stands for – without having to confront offensive religious dogma. With a (simply wonderful) daughter in elementary school, Newdow attends meetings of the local school board. Because those meetings invariably begin with a recitation of the now-religious Pledge, Newdow named the school board and its superintendent as defendants, contending that their use of the Pledge constituted a governmental endorsement of a specific religious belief – i.e., the belief that there exists a god – and thus turned him into a "political outsider."

Struck by the fact that his tax dollars are employed to further the religious message of the current Pledge, Newdow also claimed that he had taxpayer standing, detailing how both (California) state and (Article I, section 8) federal tax moneys are used. Additionally, because the State of California specifically declares that the daily recitation of the now-religious Pledge of Allegiance is a proper patriotic exercise in which public school teachers may lead their students (California Education Code § 52720) – and because the Elk Grove Unified

School District ("EGUSD") has promulgated a rule requiring recitation of the Pledge in elementary schools (AR 6115) – Newdow claimed standing on the basis of his right as a parent to have the public schools refrain from inculcating his child with any religious ideology.[1]

The school board defendants filed a Federal Rules of Civil Procedure Rule 12(b)(6) Motion to Dismiss on April 12, 2000, and – on May 15, 2000 – a hearing on that Motion was held before Magistrate Judge Peter A. Nowinski. On May 25, 2000, Findings and Recommendation, recommending that the Motion be granted, were issued. According to the Magistrate Judge:

> The Seventh Circuit's decision in *Sherman* and the statements in dicta [from this Court and two Courts of Appeal], while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, *see Allegheny*, *supra*, 492 U.S. at 593-694, the Pledge does not violate the Establishment Clause of the First Amendment.

Findings and Recommendation, at 2. (App., 112a). The District Court, Hon. Milton L. Schwartz, adopted the Findings and Recommendation in an Order issued on July 21, 2000. (App., 110a).

Newdow filed a timely notice of appeal on July 26, 2002. After briefing and oral argument, the judgment of the District Court was reversed in a panel decision rendered on June 26, 2002. The two-judge majority determined that by including the religious words, "under God," in the Pledge of Allegiance, the government has violated the Establishment Clause. Accordingly, the policy of the EGUSD was held to be impermissible. However

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1. It should be noted that Newdow also claimed violations of California's State Constitution. Those have never been addressed in either of the lower courts.

– apparently due to the national uproar that resulted from the panel majority's opinion – Circuit Judge Alfred T. Goodwin, the opinion's author, *sua sponte* stayed the judgment on June 27, 2002 (pending motions for rehearing).

Although the United States Congress had previously moved to be dismissed from the case on jurisdictional grounds (in a Motion which was granted on April 2, 2002) the Senate attempted to intervene after the June 26, 2002 decision was announced. The mother of Newdow's child did the same, claiming that their daughter "does not object to and is not uncomfortable with either personally reciting, or hearing others recite, the Pledge of Allegiance." July 31, 2002 Declaration of Sandra Banning in Support of Motion for Leave to Intervene, or Alternatively, to Dismiss the Complaint, at 3. The panel denied both Congress's and the mother's motions on December 4, 2002, while simultaneously issuing a unanimous opinion reaffirming Newdow's standing as a parent.

Motions for rehearing and rehearing *en banc* were denied on February 28, 2003. The majority panel did, however, amend its June 26, 2002 opinion at that time, eliminating the language that stated the Pledge violates the Establishment Clause. Thus, the declaratory relief sought by Newdow – i.e., a ruling that the Pledge of Allegiance (as amended by Congress's Act of 1954) is in violation of the Establishment Clause – was not obtained. Rather, the opinion below states only that, "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words "under God," violates the Establishment Clause." (App., 17a).

## PETITIONS DISTINGUISHED

The United States and the Elk Grove Unified School District have both filed Petitions for Certiorari in this case. Newdow – although the "prevailing party" in the court below – is filing a Petition as well.[2] His reasons are as follows. First, Newdow did not obtain the full relief he sought. Although the original panel stated that "we hold that . . . the 1954 Act adding the words "under God" to the Pledge . . . violate[d] the Establishment Clause," App., at 52a, that language was withdrawn in the amended opinion. Newdow, therefore, wishes for this Court to provide the full declaratory relief sought in his Original Complaint, and to have the Nation's sole Pledge returned to its pre-1954, secular condition.

Along those lines, Newdow is also asking the Court to review the limited standing determination made by the Ninth Circuit. Although he most certainly feels that his right to have his child attend public school without being inculcated with any religious belief is an interest of great importance, the pervasive antiatheistic sentiments conveyed by the infusion of God into our government is of even greater concern. Those who deny the existence of a supreme being have been turned into second class citizens by a government that continuously sends messages that "real Americans" believe in God. For this reason, Newdow seeks the explicit recognition that the injury repeatedly mentioned by this Court – i.e., being turned into a "political outsider" – is not mere hyperbole, but a true injury that warrants judicial attention. Newdow, a full citizen who happens to hold a minority religious view, has standing on his own to bring an end to the discrimination his government continues to foster.

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2. The Ninth Circuit issued its amended opinion in this case, and its order denying rehearing and rehearing *en banc*, on February 28, 2003. Absent an extension, this petition would therefore have been due on May 28, 2003. Newdow sought an extension until June 26, 2003, which was granted by Justice O'Connor on May 20, 2003.

Finally, this Petition seeks recognition of the fact that governmental immunities are not absolute, and that they must fall when the fundamental rights they exist to protect cannot be vindicated in any other manner.

## REASONS FOR GRANTING THE PETITION

### (1) The Establishment Clause Violation

> [O]ur Establishment Clause jurisprudence is in hopeless disarray."[3]

> As judges of the inferior courts of the federal system, we do our best to resolve cases in the light of Supreme Court guidance. Alas, its instructions on implementation of the Establishment Clause are not always clear, consistent or coherent.[4]

Perhaps nowhere can the creative genius of the framers be as readily appreciated as in the Establishment Clause. Realizing that religion is unique in its ability to cause divisiveness and persecution, those who drafted the body of the Constitution and the Bill of Rights – and the citizens who ratified both of these magnificent documents – broke from a long tradition of associating religious belief with civil authority. That the framers intended to completely disassociate these two arenas can be seen by the fact that – after considering numerous iterations – the final wording of the clause is as broad as can be imagined: "no law respecting an establishment of religion."

That this dissociation would also include the disassociation of God and government also seems manifest. To begin with, as was noted early on in our history:

> We formed our Constitution without any acknowledgment of GOD; without any recognition

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3. *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

4. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 627 (9th Cir. 1996) (O'Scannlain, J., concurring).

> of his mercies to us, as a people, of his government, or even of his existence. The Convention, by which it was formed, never asked, even once, his direction, or his blessing upon their labours. Thus we commenced our national existence under the present system, without GOD.[5]

Thus, for instance, the Preamble to the Constitution of the United States is devoid of any reference to the Almighty. Despite the fact that "so help me, God" commonly concluded the oaths of the era,[6] the only oath specified in the Constitution omits those words.[7]

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5. A discourse in two parts: delivered July 23, 1812, on the public fast, in the chapel of Yale College by Timothy Dwight, D.D.L.L.D., President of that Seminary; Published at the request of the students, and others; New Haven, Published by Howe and Deforest; Sold also by A.T. Goodrich and Co. No, 124, Broadway, New-York; Printed by J. Seymour, 49, John Street, New York, p. 40).

6. "So help me God" was specified in the 1777 Constitution of Georgia (Article 14), the 1780 Constitution of Massachusetts (Article 3), and the 1778 South Carolina Constitution (Article 36). Additionally, the oath in the Delaware Constitution of 1776 stated, "I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration." The 1776 Pennsylvania Constitution had a similar oath: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."

7. Article II, section 1, clause 7 of the United States Constitution states:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:
>
> "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Similarly, of the eleven[8] colonies with religious test oaths of some variety, five had proscriptions aimed in some way at atheists.[9] Yet in Article VI, clause 3, the framers employed

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8. "[E]leven of the thirteen states restricted office holding to Protestants or Christians." Epstein SB. *Rethinking the Constitutionality of Ceremonial Deism*. 96 Colum. L. Rev. 2083, 2101 (1996).

9. Maryland Constitution of 1776 (Declaration of Rights, Article 35: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention or the Legislature of this State, and a declaration of a belief in the Christian religion." Article 36: "That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being." Maryland Constitution, per se, Article 55: "That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit :-" I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland; " and shall also subscribe a declaration of his belief in the Christian religion."); Massachusetts Constitution of 1780 (Declaration of Rights, Article 2: "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe." Chapter 6, Article 1: "I, A.B., do declare that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the constitution, as one qualification for the office or place to which I am elected."); North Carolina Constitution of 1776 (Article 32: "[N]o person, who shall deny the being of God . . . shall be capable of holding any office or place of trust or profit in the civil department within this State."); Pennsylvania Constitution of 1776 (Article 2: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen." Plan or Frame of Government, Section 10: And each member, before he takes his seat, shall make and subscribe the following declaration, viz: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. (Cont'd)

language as totally prohibitory as that in the Establishment Clause: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[10]

"The Ninth Circuit's ruling in this case produced an immediate national firestorm." Brief of Amicus Bipartisan Legal Advisory Group of the United States House of Representatives, at 7. Knowing that an admission of the true reason for this reaction – i.e., that the majority simply wants their government to incorporate their preferred religious icon in its midst – would not be accepted, the defendants and others have attempted to justify the Act of 1954 by allusions to history. However, as the preceding paragraph makes clear – and as the First Amendment's text, itself, confirms – such a revisionist view of unequivocal principle is an insult to the work of the framers. As Justice Black noted, the Establishment Clause was instituted because the given religious persuasion of the various colonies "depend[ed] largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). As this case reveals all too well, the Clause is still needed for this exact same reason. This Court's acceptance of the case for review can make that fact clear, and resolve the "disarray" and incoherence.

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(Cont'd)

And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."); South Carolina Constitution of 1778 (Article 17: "The qualification of electors shall be that every free white man, and no other person, who acknowledges the being of a God").

10. Regarding Article VI, Clause 3, Joseph Story wrote:

> This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off for ever every pretence of any alliance between church and state in the national government.

3 Joseph Story, *Commentaries on the Constitution* § 1841 (Boston, 1833).

**(a) Conflict among the Courts of Appeal**

The Ninth Circuit's decision in the instant case is in direct conflict with the Seventh Circuit's opinion in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). Thus, as suggested by Supreme Court Rule 10(a), a grant of certiorari would be appropriate in this case.

In fact, a review of *Sherman* could have been justified in its own right for its rather strange analysis. For instance, even though *Sherman* was decided a mere five months after Justice Blackmun wrote:

> Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), has the Court not rested its decision on the basic principles described in Lemon.

*Lee v. Weisman*, 505 U.S. 577, 603 n. 4 (1992) (Blackmun, J., concurring), the Seventh Circuit's panel claimed that *Lemon* "as a general-purpose tool for administering the establishment clause is in doubt," 980 F.2d at 445. Thus, the *Sherman* court did not examine the purpose or the effects of the insertion of the words "under God," and focused instead on the question of "coercion."

With no need to find coercion in order to have an Establishment Clause violation,[11] the *Sherman* court was obligated to determine if there were other constitutional infirmities when it decided that coercion was absent. More to the point, however, is the extraordinary nature of that decision

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11. "[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring).

in the first place, especially in view of the fact that this Court had found coercion to be present just five months earlier in *Lee*. There, the affected students were high school seniors at a one-time event who simply observed a non-governmental invited guest imparting religious dogma. In *Sherman* – as in the case at bar – the students were of a much more "impressionable" age, the challenged activity occurred nearly two thousand times for each student, the students actively participated in the espousal of the dogma, and they were led by their state-employed teachers. In fact, the *Sherman* panel even enunciated the rule:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, the Pledge of Allegiance becomes unconstitutional under all circumstances.

980 F.2d, at 444. How that court then concluded that the public school-based Pledge recitation passes constitutional muster is cryptic at best.[12] This Court's clarification of this matter is necessary to prevent further confusion.

**(b) Important question of federal law**

Under Supreme Court Rule 10(c), it is appropriate for the Court to grant certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." The meaning and extent of the Establishment Clause's protections is certainly an "important question of federal law." This is especially so when the issue under consideration has caused as much divisiveness and rancor as has occurred in the case at bar.

Both the United States and the Elk Grove Unified School District have argued that it is untenable for the Nation to have an official Pledge that bears conflicting messages dependent

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12. The Ninth Circuit panel majority noted this as well: "We have some difficulty understanding this statement." App., at 17a.

upon venue. United States Petition for Certiorari, at 25; EGUSD Petition for Certiorari, at 16. With this Newdow agrees. Of interest is that even in presenting their arguments, the correctness of the Ninth Circuit's ruling – and the pervasiveness of the myopia that exists when religious matters are at hand – is demonstrated. The Elk Grove defendants wrote:

> Significantly, this decision will result in substantial disruption of the daily lives of the school children in the EGUSD, as well as those attending public schools within the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are prohibited from willingly reciting the Pledge as a daily patriotic exercise when the public school children in the rest of the country are permitted to say the Pledge.[13]

EGUSD Petition for Certiorari, at 16. What they fail to appreciate is that the argument, of course, works both ways, and one could at least as reasonably write:

> Significantly, this decision will result in substantial disruption of the daily lives of the school children **outside** the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are forced to endure religious dogma espoused by their public school teachers during a daily patriotic exercise when the public school children in the Ninth Circuit are provided with the protections guaranteed by the First Amendment.

Unfortunately, this failure to see both sides of a religious issue is not limited to the parties. For instance, despite the enormous public outcry engendered by the ruling in this case,

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13. Of course, this is a patently erroneous characterization of the Ninth Circuit's opinion. Individuals may say anything they desire. As the Establishment Clause provides, it is only the government that is forbidden from embracing particular religious dogma.

the chief argument of the panel dissent was that the effect of the intrusion of the religious words, "under God," in the Pledge upon atheists is "*de minimis*." Thus, we see again the foresight of the framers, who recognized that even federal judges could be oblivious to their religious biases. Removal of the two religious words from the Pledge certainly raises no constitutional issue; yet there was a virtually unprecedented response when the Ninth Circuit stated that needed to be done. That Judge Fernandez could observe that response and then persist in contending that the insertion of those words – which no one can deny at least raises a First Amendment concern – is *de minimis* seems extraordinary.

Moreover, although the defendants have based their arguments on the effects of the Pledge on school children, the importance of the matter to atheistic adults cannot be overemphasized. To be sure, "[t]his Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring). However, "impressionability" is not the only parameter of concern. The aggravation, disgust and outrage of being turned into "political outsiders" and second-class citizens – generally unrecognized by children – is extensive to the disenfranchised adult citizens who find themselves despised and ridiculed due solely to their religious beliefs. Government, of course, has no duty to overcome private biases. But it may no more strengthen, encourage or even condone antipathy based on matters of conscience than it may do these things based on matters of race. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Only forty-nine percent of Americans would vote for an atheistic candidate. Appellant's Opening Brief, at 4 (n. 7). In the constitutions of at least eight states, there still exist

provisions that deny atheists the right to hold public office and/or testify in a court of law.[14] Although politicians are subject to ruin for even tangentially discriminatory references regarding gender, majority religion or race,[15] blatant offenses against atheists are not even acknowledged.[16]

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14. Arkansas State Constitution: Article 19, Section 1 ("No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court."); Maryland State Constitution: Article 37 ("That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God."); Mississippi State Constitution: Article 14, Section 265 ("No person who denies the existence of a Supreme Being shall hold any office in this state."); North Carolina State Constitution: Article 6, Section 8 ("The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God."); Pennsylvania State Constitution: Article 1, Section 4 ("No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."); South Carolina State Constitution: Article 17, Section 4 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution."); Tennessee State Constitution: Article 9, Section 2 ("No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."); Texas State Constitution: Article 1, Section 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.")

15. The recent events related to Trent Lott's resignation as Senate Majority leader is a case in point.

16. When, on April 22, 2000, Miami Mayor Joe Carollo responded to the Bureau of Immigration and Naturalization Service's raid to free Elian Gonzales by stating, "These are atheists. They don't believe in God," no media protest was heard. Appellant's Opening Brief, at 4. When Congressman John J. LaFalce of New York issued a press release

(Cont'd)

The Pledge of Allegiance served its patriotic purposes perfectly well for sixty-two years prior to Congress's passage of the Act of 1954. Accordingly, with strict scrutiny required for intrusions of religious dogma into government,[17] a compelling interest was required before the words, "under God," could have been permissibly interlarded. That interest has yet to be enunciated.

The majority of American citizens may take great pleasure in having their religious beliefs reflected in their government. That, however, is precisely what the Establishment Clause exists to prevent, and Newdow respectfully requests that this Court take this case to reinforce that fact.

**(2) Sovereign and Speech or Debate Immunities**

The Ninth Circuit ruled that "in light of the Speech and Debate Clause of the Constitution, Art. I § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing the Congress to enact or amend legislation," App., at 5a. Similarly, the United States notes that, "No federal statute waives the sovereign immunity of the United States of America from a suit for

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(Cont'd)

a month later, equating "secular atheism" with "greed, abject poverty [and] selfishness," no call for censure was noted. *Ibid.* And, of course – without the slightest criticism – the chief sponsor of the Act of 1954 was able to garner support for his legislation by placing "An atheistic American . . . is a contradiction in terms" into the Congressional Record. 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut).

17. [W]e have expressly required "strict scrutiny" of practices suggesting "a denominational preference," in keeping with "'the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause.

*County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 608-609 (1989) (citations omitted).

declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for respondent Newdow's suit against the United States is unclear." United States' Petition for Certiorari, at 2.

This raises an issue of basic constitutional construction that the Court has never previously addressed: Due to its unique nature,[18] is a waiver of sovereign immunity and Speech or Debate immunity implicit in the Establishment Clause?

To highlight the question, suppose Congress were to enact the following:

> We hereby declare that Roman Catholicism is the official, established religion of the United States of America.

Clearly, that would be in violation of the Establishment Clause's mandate. Yet what would occur? How could such a violation be remedied? What check or balance exists to prevent that constitutional abuse?

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18. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

*Engel v. Vitale*, 370 U.S. 421, 430 (1962);

> Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.

*Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

In fact, that is precisely what the instant case is about. When Congress passed its Act of 1954, it said, in essence:

> We hereby declare that theism is the official, established religion of the United States of America.

To be sure, "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power." *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting). But when fundamental constitutional rights are trampled upon, the framers could not have intended to leave a disenfranchised political minority with no recourse. On the contrary, as was stated in the earliest part of our history:

> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

*Marbury v. Madison*, 5 U.S. 137, 178 (1803). As Chief Justice Marshall concluded, "[A] law repugnant to the constitution is void." *Id.*, at 180.

Chief Justice Rehnquist has noted:

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter

> and to give each provision within that document the full effect intended by the Framers.

*Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting). Obviously, turning the Establishment Clause into a nullity does not give that provision "the full effect intended by the Framers."

> The judgment in [*Marbury v. Madison*] is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority . . . in respect of the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution.

*Myers v. United States*, 272 U.S. 52, 139 (1926). Immunities designed to ensure that our liberties remain protected cannot be turned into shields that allow those very liberties to be attacked by those entrusted with providing the protection.

**(3) Article III Standing**

Although standing in Establishment Clause challenges should be easily determinable according to the parameters previously set forth in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982), difficulties still arise. The need for further clarification in this arena also supports granting this Petition.

The Court of Appeals found that Newdow has standing as a parent, and therefore limited its standing analysis to that one realm. Newdow, however, has always believed that he primarily has standing in his own right. In fact – without minimizing the personal harm that occurs when one's child is inculcated with religious dogma while attending the public schools – the harm to an adult who is turned into "second-class" status on the basis of his religious persuasion is at least as severe.

**(a) Outsider status**

The Court has repeatedly stated that no American citizen should be turned into a "political outsider" due to his or her religious beliefs. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577 (1992) (Blackmun, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668 (1984). That is, in fact, the "individualized harm" necessary to meet the "injury-in-fact" component of the current standing doctrine. To be sure, simply being offended by a governmental action is insufficient to show a "personalized injury." But being offended because the government has infringed upon one's societal status on the basis of his or her particular religious belief system is precisely the sort of personal injury that standing doctrine envisions.[19]

Since the inception of this case, Newdow has argued that he, himself, has been turned into an "political outsider" by the intrusion of the religious words, "under God," into the Pledge. Furthermore, like millions of his religious brethren, Newdow is forced to confront offensive religious dogma any time he

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19. [I]f the evil prevented by the establishment clause is the sending of messages which make citizens feel like "outsiders," as [Justice] O'Connor contends, an establishment clause plaintiff logically should not be required to allege a "substantial" or "severe" burden on *the exercise* of his religion. It should be sufficient, rather, to assert that he feels like an "outsider" because of some governmental message touching upon religion.

S.D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 268, 300 (1987).

wishes to join his fellow citizens in pledging his allegiance to the flag. This is an outlandish offense that needs to be examined under a strict scrutiny analysis. With both the District Court and the Defendants having accepted Plaintiff's claim that he has been made to feel like an "outsider" due to the governmental acts challenged in this case, R., at 187-188 (Tr. 51:16 – 52:4), the burden of proof has shifted to the government. Unless it can be shown that there is a compelling interest in "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter),"[20] the Court should take this opportunity to announce once and for all that, in this country, every religious view will be protected by "the most demanding test known to constitutional law."[21]

**(b) Equal Protection**

This is an equal protection case where atheists such as Newdow – unlike those of the majority theistic religious persuasion – are unable to join their fellow citizens in pledging allegiance to the Nation's flag without being confronted with offensive religious dogma. As this Court has just made clear, "'[t]he "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.'" *Gratz v. Bollinger*, __ U.S. __ (June 23, 2003) (citing

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20. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). The issue of sectarianism – and the confusion caused by the misapplication of that concept – is another aspect of the Establishment Clause that further warrants a grant of certiorari. Newdow has provided evidence of the varying and arbitrary manner in which that word has been used. *See* Complaint ¶¶ 42-48; Record Excerpts, at 131-135. Constitutionally, any religious dogma that excludes any American citizen on the basis of his or her religious beliefs is sectarian.

21. "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)). In fact, both the imposition of the barrier and the inability to obtain the benefit exist in the instant action.

**(c) Taxpayer standing**

This Court's clear statement that "federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution" *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988), should suffice to make it clear that Newdow has taxpayer standing in this case. His demonstration that federal (and state and local) tax dollars are used to promote the now-religious Pledge[22] has never been properly addressed.

**(d) Newdow's Parenthood**

Newdow is a devoted parent who shares joint physical custody of his daughter. Although he has been deprived of the legal custody of his child,[23] his interests and rights in directing her education have not been abrogated to anywhere near a degree sufficient to deprive him of standing as a parent in this case. This unanimous finding of the Ninth Circuit panel does not require review.

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22. *See* Original Complaint, ¶¶ 109-117; Plaintiff's April 26, 2000 Opposing Memorandum of Law, at 13-14.

23. It is not within the province of this Petition to detail the circumstances that led to this loss of legal custody. Suffice it to say that Newdow – an incredibly outstanding parent – was accused of "child neglect" for letting his daughter (while he dutifully stood by at the entrance) use an airport women's room. It was his challenge to the "expert psychologist" who made this ludicrous and irresponsible claim that resulted in this restriction of his fundamental constitutional right of parenthood. The matter is currently before the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

## CONCLUSION

The petition for a writ of certiorari should be granted. Americans of every religious persuasion should be accorded equal respect, and the uniqueness of the Establishment Clause - and its relevance with respect to governmental immunity – should be addressed. Finally, the Court should detail the requirements for standing, which have caused tremendous confusion in the lower courts.

Respectfully submitted,

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Supreme Court, U.S.
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AUG 4 2003

No. 03-7

# In the Supreme Court of the United States

MICHAEL A. NEWDOW, PETITIONER

*v.*

UNITED STATES CONGRESS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether there is a waiver of sovereign and Speech or Debate immunities inherent in the Establishment Clause.

3. Whether a noncustodial parent has Article III standing to challenge the Pledge of Allegiance on Establishment Clause grounds.

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MICHAEL A. NEWDOW, PETITIONER

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UNITED STATES CONGRESS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (02-1574 Pet. App. 1a-24a) is reported at 328 F.3d 466.[1] The original opinion of the court of appeals (Pet. App. 25a-58a) is reported at 292 F.3d 597, and the court's subsequent opinion on standing (Pet. App. 89a-98a) is reported at 313 F.3d 500. The opinion and orders of the court of appeals denying intervention (Pet. App. 99a-109a) are reported at 313 F.3d 495 and 313 F.3d 506. The order of the district court (Pet. App.

[1] Citations are to the appendix to the petition for a writ of certiorari filed by the United States in No. 02-1574, *United States* v. *Michael A. Newdow*, because the instant petition does not include an appendix and the appendix in No. 02-1574 is the one to which petitioner Newdow refers. See Pet. 1 n.**.

110a), adopting the findings and recommendation of the magistrate judge that the case be dismissed (Pet. App. 111a-112a), is unreported.

## JURISDICTION

The court of appeals entered its original judgment on June 26, 2002. The court issued an amended opinion on rehearing on February 28, 2003. The court of appeals issued an order staying its mandate on March 4, 2003. On May 20, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 26, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

## STATEMENT

1. In 1942, as part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a pledge of allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). As originally enacted, the Pledge of Allegiance read: "I pledge allegiance to the flag of the

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[2] As noted in the United States' petition (02-1574 Pet. 2 & n.1), no federal statute waives the sovereign immunity of the United States for suits seeking declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for petitioner's suit against the United States is unclear. However, the absence of such a waiver is without jurisdictional consequence in this case because the United States could have, and through the filing of its own petition for a writ of certiorari should be deemed to have, intervened as of right in this action against the school district and its superintendent to defend the constitutionality of the Pledge of Allegiance, 4 U.S.C. 4, against petitioner's facial and as-applied challenges. See 28 U.S.C. 2403(a).

United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

In amending the Pledge, the Committee Reports noted that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see also S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, with the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, *supra*, at 2; S. Rep. No. 1287, *supra*, at 2.

The Reports further explained that the amendment would highlight a foundational difference between the United States and "Communist[]" nations: "Our Ameri-

can Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, *supra*, at 1-2; see also S. Rep. No. 1287, *supra*, at 2. As amended, the Pledge would thus textually reject the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, *supra*, at 2; see also S. Rep. No. 1287, *supra*, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."). The House Report further noted that, through "daily recitation of the pledge in school," "the children of our land * * * will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us." H.R. Rep. No. 1693, *supra*, at 3.

Both the Senate and House Reports expressed the view that, under controlling precedent from this Court, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, *supra*, at 3 (citing *Zorach* v. *Clauson*, 343 U.S. 306 (1952)); see also S. Rep. No. 1287, *supra*, at 2.[3]

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[3] Following the court of appeals' decision in the instant case, Congress reaffirmed the content of the Pledge of Allegiance and Congress's view that the legislation is constitutional. Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1(11), 116 Stat. 2059.

2. California law requires that each public elementary school in the State "conduct[] appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (West 1989). The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." *Ibid.* In satisfaction of that statutory requirement, respondent Elk Grove Unified School District (Elk Grove) has adopted a policy that directs each of its elementary schools to "recite the pledge of allegiance to the flag once each day." Pet. App. 27a. No child is compelled to join in reciting the Pledge. *Id.* at 28a.

Petitioner Michael Newdow is the noncustodial father of a child enrolled in a public elementary school within the jurisdiction of respondent Elk Grove. Pet. App. 2a, 90a-91a. In the school that petitioner's daughter attends, the teacher leads the students in reciting the Pledge of Allegiance daily. *Id.* at 3a.

The child's mother, who was never married to petitioner, has "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child. Pet. App. 90a-91a. While petitioner retains limited visitation rights, the right to access the child's school and medical records, and the right to "consult" on "substantial" decisions pertaining to the child's "educational needs," if the parents disagree, the child's mother "may exercise legal control of" the child as long as it "is not specifically prohibited or inconsistent with the physical custody order." *Id.* at 91a.

In March 2000, petitioner filed suit against the United States Congress, the President, the United States of America, the State of California, and two California school districts and their superintendents,

seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment. Compl. 6, 36; Pet. App. 4a-5a. He also sought injunctive relief requiring Congress and the President to remove those words from the Pledge and prohibiting California schools from leading students in reciting the Pledge. Compl. 37; Pet. App. 4a-5a. The Complaint explains that petitioner's child is "an unnamed plaintiff whom he represents as 'next friend.'" Compl. 3. The Complaint asserts that the recitation of the Pledge in his child's school "results in the daily indoctrination of the Elk Grove Unified School District's students—including Plaintiff's daughter—with religious dogma," *id.* at 18-19, and that such actions "infringe[]" upon petitioner's "unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* at 20; see also *id.* at 36. The Complaint further asserts that petitioner's "position as the father of a child attending the State's public schools grants him standing in this matter in his own right and on behalf of his daughter." *Id.* at 26.

The district court dismissed the complaint for failure to state a claim, relying on numerous decisions of this Court expressly addressing the Pledge and describing it as consistent with the Establishment Clause, as well as on a decision of the Seventh Circuit rejecting a similar challenge to the Pledge. Pet. App. 110a-112a (adopting magistrate judge's findings and recommendation, which cites *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Sherman* v. *Community Consol. Sch. Dist.*

*21*, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993)).

3. a. A divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 25a-58a. As an initial matter, all three members of the panel agreed with the dismissal of the President and Congress from the lawsuit, on the grounds that the President is not a proper defendant for challenging the constitutionality of a federal law under *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), and that the Congress cannot be sued under the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See Pet. App. 29a-30a; *id.* at 53a (Fernandez, J., concurring and dissenting). The court also ruled that petitioner lacks standing to file suit against the Sacramento City Unified School District and its superintendent "because his daughter is not currently a student there." *Id.* at 32a.

The court did conclude, however, that petitioner has standing to challenge Elk Grove's policy of reciting the Pledge "because his daughter is currently enrolled in elementary school" in Elk Grove. Pet. App. 32a. In addition, a majority of the court concluded that petitioner has standing in his own right to challenge the facial constitutionality of the 1954 Act amending the Pledge because "the mere enactment of a statute may constitute an Establishment Clause violation," *id.* at 33a, and because the 1954 Act amounts to a "religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter." *Id.* at 37a.[4]

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[4] The court did not address the constitutionality of the California law requiring patriotic exercises in elementary school classrooms. Pet. App. 30a-31a.

b. Turning to the merits of petitioner's complaint, the majority held that, with the addition of the phrase "under God," the Pledge of Allegiance violates the Establishment Clause. Pet. App. 37a-42a. The majority began by explaining that this Court has adopted three different tests to analyze Establishment Clause violations (*id.* at 37a)—the three-prong test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); the "endorsement" test, *County of Allegheny*, *supra*; and the "coercion" test, *Lee* v. *Weisman*, 505 U.S. 577 (1992)—and that the court of appeals was "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." Pet. App. 41a.

The majority held that the 1954 Act and the school district policy failed the "endorsement" test both because the Pledge's reference to God "is a profession of a religious belief, namely, a belief in monotheism" and because it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." Pet. App. 41a-42a. The majority further concluded that the 1954 Act and the school district's policy fail the "coercion" test because "the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." *Id.* at 45a.

Finally, the majority concluded that the Pledge fails the *Lemon* test because it has the purpose of advancing religion. Pet. App. 46a. In so holding, the majority rejected the United States' argument that the Pledge should be looked at "as a whole," and concluded that the "*sole* purpose" of the 1954 Act was to "advance religion, in order to differentiate the United States from nations under communist rule." *Id.* at 46a-47a. The majority further concluded that Elk Grove's policy ran afoul of the *Lemon* test because it "convey[s] an impermissible

message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God." *Id.* at 50a.

The majority dismissed in a footnote the numerous statements by this Court and its Members expressly addressing the Pledge and affirming its constitutionality as "dicta" that was announced by this Court without "appl[ying] any of the three tests to the Act." Pet. App. 50a-51a n.12. The majority also expressly disagreed with the analysis and conclusion of the Seventh Circuit in *Sherman*, *supra*, which upheld the Pledge against a similar Establishment Clause challenge. *Ibid.*

c. Judge Fernandez dissented. Pet. App. 53a-58a. Judge Fernandez first expressed his "serious misgivings" about the majority's conclusion that petitioner had standing to challenge the facial constitutionality of the 1954 Act, but ultimately concluded that the question "makes little difference to the resolution of the First Amendment issue in this case." *Id.* at 53a n.1. With respect to the Establishment Clause challenge, Judge Fernandez explained that "such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Id.* at 55a. Judge Fernandez also noted that this Court has repeatedly indicated that the Pledge's text, as amended, does not violate the Establishment Clause, and he agreed with the Seventh Circuit that the court of appeals should "respect" those assurances: "If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Ibid.* (quoting *Sherman*, 980 F.2d at 448).

Finally, Judge Fernandez accused the majority of confining itself to legal "elements and tests, while failing to look at the good sense and principles that animated those tests in the first place." *Id.* at 57a; see also *id.* at 57a n.8 (noting that the majority's holding would preclude use of many patriotic songs, such as "God Bless America," "America the Beautiful," "The Star Spangled Banner," and "My Country 'Tis of Thee," in public ceremonial occasions).

d. While the case was pending on the United States' and Elk Grove's petitions for rehearing and rehearing en banc, the mother of petitioner's child notified the court that petitioner lacked legal custody of the child and legal control over the child's educational and religious upbringing. She further advised that, as the custodial parent, she "wish[es] for her [child] to be able to recite the Pledge at school exactly as it stands." Banning C.A. Mot. to Intervene 10. The United States then filed a motion to enlarge the record and a supplemental brief arguing that petitioner lacks standing to prosecute his challenge to the Pledge on its face or as applied by Elk Grove.

The court of appeals issued a separate decision holding that petitioner has standing to prosecute his constitutional challenge to the Pledge. Pet. App. 89a-98a. The court concluded that, while petitioner no longer could prosecute the action on behalf of or to vindicate the interests of his child, petitioner continued to have standing in his own right to challenge "unconstitutional government action affecting his child." *Id.* at 92a. The court noted that the custody agreement does not strip petitioner of all of his parental rights, because he retains the "the right to inspect his daughter's school and medical records" and the "right to consult" on educational decisions, albeit with the mother "having

ultimate decision-making power." *Id.* at 95a. The court then reasoned that, because California law recognizes a right in noncustodial parents to "expose" their children to their beliefs and values, petitioner was injured because state law "surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent." *Id.* at 96a. The court further reasoned that petitioner has standing because the mother "has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." *Ibid.* Because the Pledge, in the court's view, "provides the message to Newdow's young daughter" that "her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom," the court concluded that petitioner has suffered a legally cognizable injury that provides him with Article III standing. *Id.* at 97a.[5]

4. a. The court issued an amended opinion on rehearing. Pet. App. 1a-24a. In its amended opinion, the court limited its Establishment Clause holding to the Pledge's use by Elk Grove in its schools. *Id.* at 18a. With respect to petitioner's challenge to the facial constitutionality of the Pledge, the court of appeals vacated the district court's decision in favor of the United States and remanded "for further proceedings consistent with our holding." *Ibid.*

In addition, the court amended its decision to hold only that Elk Grove's policy violated the coercion test, and did not address either the endorsement test or the

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[5] Judge Fernandez concurred in the judgment on standing, but not in the majority's "allusions to the merits of the controversy." Pet. App. 98a.

*Lemon* test. Pet. App. 11a. The panel, however, concluded that the recitation of the Pledge violated the coercion test for the same reasons that the original opinion found a violation of the endorsement test. Compare *id.* at 11a-13a, with *id.* at 41a-43a.

The court also elaborated on its rejection of the numerous statements in this Court's opinions affirming the constitutionality of the Pledge and similar official acknowledgments of the Nation's religious heritage. The court assumed that "public officials do not unconstitutionally endorse religion when they recite the Pledge," but that schools nevertheless could not "coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates." Pet. App. 15a. The court also purported to distinguish references to God in the Pledge from those in the Declaration of Independence and National Anthem on the ground that the pledge "is a performative statement." *Id.* at 16a; see also *ibid.* ("To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.").

Judge Fernandez dissented from the court's Establishment Clause holding for the same reasons discussed in his initial dissenting opinion. Pet. App. 19a-24a. Judge Fernandez also noted that, although the majority "now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence." *Id.* at 19a n.1.

b. Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, filed a lengthy dissent from the court of appeals' denial of rehearing en

banc. Pet. App. 67a-87a. The dissent described the panel opinion as

> wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

*Id.* at 67a-68a (footnote omitted). The dissent stressed that this Court has distinguished between "patriotic invocations of God on the one hand," and public school "prayer, an 'unquestioned religious exercise.'" *Id.* at 72a. The dissent further observed that, until the panel's decision here, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." *Id.* at 78a-79a. Finally, the dissent noted that, while the panel "adopts a stilted indifference to our past and present realities as a predominantly religious people," *id.* at 86a-87a, "the Supreme Court has displayed remarkable consistency —patriotic invocations of God simply have no tendency to establish a state religion," *id.* at 86a.

Judges McKeown, Hawkins, Thomas, and Rawlinson separately dissented from the denial of rehearing en banc on the ground that the case "presents a constitutional question of exceptional importance." Pet. App. 88a.

## DISCUSSION

1. The first question presented by the petition—whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag,

4 U.S.C. 4, violates the Establishment Clause of the First Amendment—is identical to the question presented by the United States' petition for review from the same Ninth Circuit judgment. See 02-1574 Pet. I. Thus, to the extent petitioner here seeks review of the same aspects of the court of appeals' judgment as the United States does in its own petition (that is, both the court's ruling that the Pledge is unconstitutional as applied in schools and the court's vacatur of the judgment in the United States' favor concerning the facial constitutionality of the Pledge), the United States agrees that an exercise of this Court's certiorari jurisdiction is warranted, for the reasons explained in the government's own petition and reply brief at the petition stage. See 02-1574 Pet. 13-30; 02-1574 Pet. Reply 1-8.

In his petition (Pet. 7), however, petitioner more broadly frames the question as an effort to obtain "the full declaratory relief sought in his Original Complaint." In that complaint, petitioner seeks declaratory relief against not just the United States, but also against the Congress. See Compl. 36 ("WHEREFORE, Plaintiff prays for relief and judgment as follows: I. To declare that Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses of the United States Constitution."). Accordingly, to the extent that the petition, and in particular the second question presented, seeks this Court's review of the court of appeals' dismissal of petitioner's claims against the Congress, see Pet. App. 5a-6a, further review should be denied.

As the court of appeals correctly concluded (Pet. App. 5a-6a), the Speech or Debate Clause of Article I precludes courts from exercising jurisdiction over the Congress, or any of its Members, for claims arising

from the enactment or amendment of legislation. That Clause provides that "[t]he Senators and Representatives * * * shall not be questioned in any other Place" "for any Speech or Debate in either House." U.S. Const. Art. I, § 6. This Court has read the Speech or Debate Clause "broadly to effectuate its purposes," such that any conduct falling within the "sphere of legitimate legislative activity" is immune from scrutiny by the courts. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Because passage of the 1954 amendment to the Pledge of Allegiance was quintessential legislative activity, it falls squarely within the aegis of the Speech or Debate Clause. *Id.* at 504 (Clause protects all activities "integral" to the "consideration and passage or rejection of proposed legislation") (quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972)). That protection applies regardless of whether the conduct is alleged to violate the First Amendment. *Eastland*, 421 U.S. at 509-511.

Petitioner asks this Court to decide whether the Establishment Clause includes an implicit waiver of sovereign immunity and Speech or Debate immunity. *Eastland* already rejected the argument that First Amendment claims are excepted from Speech or Debate immunity. 421 U.S. at 509-511. Likewise, this Court has long held that sovereign immunity extends to claims asserting violations of constitutional rights. See, *e.g.*, *Ex parte Young*, 209 U.S. 123, 150 (1908). Indeed, there would be no need for the doctrine developed in *Ex parte Young*, which permits suits for injunctive relief against individual officers of the government to enforce constitutional rights, *id.* at 155-156, if suit directly against the United States (or the States) were permissible any time a First Amendment violation is

alleged.[6] Petitioner, moreover, identifies no conflict in the circuits, or any authority at all, that supports his contention that he may obtain declaratory relief against the United States Congress or that the Establishment Clause implicitly waives the United States' sovereign immunity.

Furthermore, because the United States is a named defendant, and would voluntarily appear as an intervenor under 28 U.S.C. 2403 in any event, the question of the United States' sovereign immunity is moot, and the addition of the United States Congress would have no practical effect on the scope of declaratory relief available to petitioner.

Beyond that, it is not uncommon for pro se plaintiffs, like petitioner, to misidentify the appropriate federal defendants in a suit challenging the constitutionality of federal law. Which governmental defendants may properly be sued in such pro se cases is a matter that the lower courts routinely resolve without "turning the Establishment Clause" or any other constitutional provision "into a nullity," as petitioner fears. Pet. 20. Indeed, at the same time that the court of appeals dismissed the Congress from this case, it granted petitioner relief on his constitutional claim. The question of

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[6] Thus, contrary to petitioner's assertion (Pet. 18-19), Congress's and the United States' immunity from suit does not leave individuals without recourse against Establishment Clause violations. "Legislative immunity does not, of course, bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969). The immunity doctrines simply bar judicial review of legislation in actions directly against the Congress, its Members, or the United States. See *Tilton* v. *Richardson*, 403 U.S. 672, 683-684 (1971) (invalidating portion of Act of Congress on Establishment Clause grounds, even though neither Congress nor the United States was named as a defendant).

Congress's amenability to suit thus does not present the type of important or pressing constitutional question that merits an exercise of this Court's certiorari jurisdiction. Accordingly, to the extent that petitioner's first and second questions presented exceed the scope of the questions presented by the United States for review, the petition should be denied.[7]

2. Petitioner also seeks this Court's review of the question whether he has standing to challenge the Pledge of Allegiance. Pet. 20-23. The court of appeals, however, held that petitioner *does* have standing to challenge the Pledge of Allegiance. Pet. App. 6a-8a. Petitioner thus is not aggrieved by the Ninth Circuit's standing judgment and lacks standing to seek this Court's review of that judgment in his favor. See, *e.g.*, *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) ("[a] party may not appeal from a judgment or decree in his favor"). To the extent that petitioner is of the view that his standing can properly be rested on a variety of grounds beyond that upon which the court of appeals relied, see Pet. 21-23, he may present those arguments in defense of the judgment below if this Court grants the United States' petition, which seeks review of the Ninth Circuit's holding that petitioner Newdow has standing to challenge the Pledge. See 02-1574 Pet. I.

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[7] Although petitioner names the President as a respondent, the petition itself does not seek review of the court of appeals' correct holding that *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality opinion), precludes petitioner's suit against the President of the United States. See Pet. App. 5a.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. To the extent that the first and third questions presented duplicate those presented by the United States in its own petition, *United States* v. *Newdow*, No. 02-1574, the petition should be held pending this Court's disposition of the government's petition, and then disposed of as appropriate in light of the Court's decision there.

Respectfully submitted.

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No. 03-7

In The

# SUPREME COURT OF THE UNITED STATES

MICHAEL A. NEWDOW,
*Petitioner,*

vs.

THE CONGRESS OF THE UNITED STATES, ET Al.
*Respondents,*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## BRIEF FOR THE SCHOOL DISTRICT RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Pledge of Allegiance codified in 1954 with the phrase "under God" included therein violates the Establishment Clause of the First Amendment to the United States Constitution?

2. Whether Petitioner can challenge lower court decisions regarding standing when it was held by the lower court that he does in fact have standing?

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## OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 2003, is reported at Newdow v. United States Congress, 328 F.3d 466. 02-1624 Pet. App. 1-24.[1] The original version of the opinion, filed on June 26, 2002, is reported at Newdow v. United States Congress, 292 F.3d 597. Pet. App. 25-56. The order of the Ninth Circuit denying rehearing and rehearing *en banc*, filed February 28, 2003, is reported at Newdow v. United States Congress, 321 F.3d 772. Pet. App. 57-86. The Ninth Circuit's decision regarding Petitioner's standing to bring suit is reported at Newdow v. United States Congress, 313 F.3d 500. Pet. App. 87-96.

The memorandum order of the United States District Court for the Eastern District of California of July 21, 2000, granting Petitioners' Motion to Dismiss, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22366. Pet. App. 97. The memorandum findings and recommendation of United States Magistrate Judge Peter A. Nowinski for the United States District Court for the Eastern District of California of May 25, 2000, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22367. Pet. App. 98-99.

## JURISDICTION

The Ninth Circuit Court of Appeals entered its original judgment on June 26, 2002, and issued an amended opinion on February 28, 2003. Petitioner Newdow requested an extension of

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[1] Citations are to the appendix to the petition for a writ of certiorari filed by the Elk Grove Unified School District and David W. Gordon in Case No. 02-1624, Elk Grove Unified School District, et al v. Michael A. Newdow, because the instant petition does not include an appendix.

the time in which he had to file a petition for writ of certiorari and that request was granted on May 20, 2003 by Justice O'Connor. Petitioner was given until June 27, 2003, in which to file his Petition and he did so on that date.[2] The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

### A. History of the Pledge of Allegiance

In 1942, the Pledge of Allegiance ("Pledge") was codified to read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, section 7, 56 Stat. 380. In 1954 Congress amended the Pledge to include the words "under God." Act of June 14, 1954, ch. 297, section 7, 68 Stat. 249.

In amending the Pledge, it was noted that the reason for adopting the amendment was to acknowledge the role of God in the history of our country. The House Report reveals:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. H.R. Rep. No. 1693, 83d Cong. 2d,

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[2] Respondents Elk Grove Unified School District and David W. Gordon sought an extension of time in which to file an opposition to Newdow's Petition and on July 30, 2003, received an extension until August 29, 2003, in which to file an opposition brief.

*see* 2 (1954).

The House Report further discussed references to God in the Declaration of Independence, the inscription of "In God We Trust" on coins, and references to God in the Gettysburg Address. Id. It was even noted that Representative Louis C. Rabaut, in testifying at the subcommittee hearing, "aptly" stated the need for the legislation as follows:

> By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. Id. at 3.

He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." Id.

In writing the amendment to the Pledge, the Legislative Reference Service of the Library of Congress to the Assistant Counsel of the House Committee on the Judiciary was asked to provide an opinion regarding the proper placement of the phrase "under God." Specifically, it was asked to review the following placements so as to determine which would be consistent with the legislative intent: (1) ". . . Republic for which it stands, one Nation, under God . . ."; (2) ". . . Republic for which it stands, one Nation under God . . ."; or (3) ". . . Republic for which it stands, one Nation indivisible under God . . . ." Id. at 4. By considering the legislative intent, the Legislative Reference Service concluded that the phrase "under God" was a modifier to the phrase "one Nation" because the addition was intended to affirm that the United States was founded on a fundamental belief in God. Id. Thus the placement of the phrase indicates an intent to recognize a historical fact, not an intent to establish a religion or turn the

Pledge into a religious prayer.

B. The California Statute and Elk Grove Unified School District Policy.

A California statute requires that each public elementary school in the State "conduct appropriate patriotic exercises" at the beginning of each school day. Cal. Educ. Code Section 52720. The Pledge is recognized as satisfying this requirement. Id. To satisfy this statutory provision, the Elk Grove Unified School District enacted a policy that instructs its elementary school teachers to begin each school day by leading their students in reciting the Pledge. No child is compelled to recite the Pledge.

C. The Court Proceedings to Date

On March 8, 2000, Petitioner filed suit against Respondents and others in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief, but not damages. Respondent alleged that his minor daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's (sic) is 'one nation under God.'" Pet. App. 5.

Thereafter, Respondents and other Defendants filed a motion to dismiss Petitioner's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Magistrate Judge Nowinski held a hearing on this motion, wherein Respondents requested that he issue a ruling concerning the constitutionality of the Pledge, and that the court defer ruling on the other issues. Respondents were joined in this motion by the United States Congress, the United States, and the President of the United States. Magistrate Judge Nowinski found the Elk Grove

Unified School District's policy did not violate the First Amendment. Pet. App. 98-99. These findings and recommendations were adopted on July 21, 2000, by District Judge Milton J. Schwartz of the United States District Court for the Eastern District of California. Pet. App. 97.

On appeal, a Ninth Circuit panel found that Petitioner "has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." Pet. App. 31. Since Petitioner's daughter was enrolled in the Elk Grove Unified School District ("EGUSD") at the time the decision was rendered, the Court found that Petitioner has standing to challenge the EGUSD's Pledge recitation policy. Pet. App. 32. The panel also found that Petitioner has standing to challenge the 1954 Act as it constitutes a religious recitation policy that interferes with his right to direct the religious education of his daughter. Pet. App. 36.

With respect to the merits of Petitioner's complaint, a majority of the panel found that the 1954 Act violated the Establishment Clause. Pet. App. 48-50. In so holding, the Court evaluated the phrase "under God" utilizing three tests fashioned by this Court: (1) the Lemon test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971); (2) the endorsement test enunciated in Justice O'Connor's concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984); and the coercion test set forth in Lee v. Weisman, 505 U.S. 577 (1992). Pet. App. 36-51. The majority found that the phrase violates all three tests. Pet. App. 37-44. The majority also found that the EGUSD's policy violates the Establishment Clause. Pet. App. 48-50.

Judge Fernandez, nevertheless, dissented from the majority's decision stating, "the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis." Pet. App. 52. In so finding, Judge Fernandez correctly recognized that this Court has previously considered the Pledge in dicta and

found it to be "consistent with the proposition that government may not communicate an endorsement of religious belief." Pet. App. 53 *citing* County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989).

Judge Fernandez also recognized that the Seventh Circuit had found the Pledge to be constitutional in Sherman v. Cmty Consol. Sch. Dist. 21, 980 F.2d 437, 448 (1992), cert denied, 508 U.S. 950 (1993), wherein that court stated:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so. Pet. App. 53.

Thus, while Judge Fernandez heeded this call and considered the previous statements of this Court, the majority failed to do so.

After a Petition for Rehearing and a Petition for Rehearing En Banc were filed, the majority panel amended its decision to hold only that the EGUSD's policy violated the coercion test set forth in Lee. Pet. App. 11. The majority did not consider whether the policy violates the Lemon test or the endorsement test. Pet. App. 11. Judge Fernandez again dissented from the majority's finding as to the merits of the case. Pet. App. 18-24.

## DISCUSSION

### A. The Merits of the Matter

Petitioner first asks this Court to grant him the full declaratory relief he sought, i.e. to find the Pledge unconstitutional and to thus return the Pledge to its pre-1954 condition. Pet. 7. In so doing, he requests this Court determine whether 4 U.S.C. Section 4 violates the Establishment Clause.

In its Petition, the EGUSD asked this Court to review the issue of whether its Pledge recitation policy violates the Establishment Clause. 02-1624 Pet. 6-19. In conjunction with this request, the EGUSD argued that in finding its policy to be unconstitutional, the majority essentially found the Pledge to be unconstitutional on the grounds that the Pledge is a profession of religious belief. 02-1624 Pet. 11-14. Therefore, to the extent Petitioner herein seeks review of the constitutionality of the Pledge, the EGUSD agrees that review is warranted by this Court, for the reasons set forth in its Petition. *See* 02-1624 Pet. 6-19.

Respondents disagree, however, with Petitioner's characterization of the Seventh Circuit's opinion in Sherman. First, Petitioner questions the Court's statement that the use of Lemon in evaluating Establishment Clause cases was in doubt at the time Sherman was decided. As Petitioner notes, the Sherman decision was rendered just five months after this Court created the coercion test in Lee. 03-7 Pet. 12. Thus, it is perfectly logical that the Sherman court would note that the Establishment Clause area of the law was in flux at that time since the coercion test had just come into being.

Moreover, Petitioner's argument regarding the Sherman court's failure to find coercion despite the then-recent holding in Lee fails to address the fact that Lee was a religious prayer case while Sherman was not. Further, as observed by Justice

O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc in the instant case, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." 02-1624 Pet. App. 77.

The distinction between school prayer cases and patriotic exercise cases was recognized by the United States District Court for the Eastern District of California in 1968 in the case of Smith v. Denny, 280 F.Supp. 651, 653-54, wherein the court upheld the constitutionality of the Pledge. In Smith, the court compared the patriotic exercise of the Pledge to the patriotic exercise of singing the national anthem which contains a verse that references god. The Smith court reviewed the case of Sheldon v. Fannin, 221 F.Supp. 766 (D. AZ 1963), where the court found the national anthem was not a religious exercise, but was instead a patriotic ceremony intended to inspire devotion and love of the country. Id. at 774. "Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation." Id. On that basis, the Smith court found the reference to god in the Pledge also relates to a historical fact and thus held that a California statute regarding patriotic exercises in secondary schools, wherein the Pledge was noted to be an acceptable exercise, did not violate the Establishment Clause.

The insight of the Sherman and Smith cases remains intact. Recitation of the Pledge is much different than the school prayer cases decided by this and other Courts. Therefore, Petitioner's reliance on the school prayer cases as an analytical framework for evaluating this case is questionable -- especially in light of this Court's repeated statements that the Pledge does not violate the establishment clause. 02-1654 Pet. 8-9.

If the Court is inclined to utilize a specific framework to analyze the constitutionality of the Pledge, Respondent submits the

flexible approach set forth in Marsh v. Chambers, 463 U.S. 783, 792 (1983), is appropriate. In Marsh, this Court affirmed the constitutionality of legislative prayer based on the historical acceptance of the practice which had become "part of the fabric of our society." Id. Here, as in Marsh, Petitioner should not be permitted to challenge the historically accepted practice of reciting the Pledge as currently codified.

Whether one utilizes the flexible approach set forth in Marsh or examines the prior statements of this Court regarding the constitutionality of the Pledge, it is clear that Petitioner's reliance on Lee is misplaced. For each of these reasons, Respondents respectfully submit that summary reversal of the Ninth Circuit Majority's decision in this case is warranted and appropriate.

B. Standing

As for Petitioner's request that this Court review whether he has standing in any number of different ways to bring the instant suit, Respondents submit that Petitioner is unable to seek review of the question since it was decided in his favor by the Ninth Circuit. *See* Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) ("[a] party may not appeal from a judgment or decree in his favor"). Thus, even if this Court finds Petitioner does not have standing to bring the instant claim because, as a noncustodial parent, he does not have the right to direct the religious education of his daughter, then the matter should be remanded to the Ninth Circuit to determine whether he has standing in some other capacity.

## CONCLUSION

For the foregoing reasons, Petitioner's Petition for review to determine that he has standing to bring the instant lawsuit for

reasons other than those found by the Ninth Circuit should be denied as the issue is not properly before this Court. To the extent Petitioner's request for review of the constitutionality of the 1954 Act mimics the request of Respondents in their Petition, Elk Grove Unified School District et al v. Newdow, Case No. 02-1624, Respondents respectfully submit that review of this Petition should be held until this Court has decided the EGUSD's Petition. Once a decision has been rendered regarding the EGUSD's Petition, then the Court should address the instant Petition in conformance with its decision regarding the EGUSD's Petition.

Dated: August 28, 2003

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No. 03-7

IN THE
**SUPREME COURT OF THE UNITED STATES**

THE REV. DR. MICHAEL A. NEWDOW,
*Petitioner,*

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES; THE STATE OF CALIFORNIA; THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD"); DAVID W. GORDON, SUPERINTENDENT, EGUSD; THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD"); DR. JIM SWEENEY, SUPERINTENDENT, SCUSD,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

# *AMICUS CURIAE* BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, INC. IN SUPPORT OF THE REV. DR. MICHAEL A. NEWDOW, PETITIONER

RECEIVED
JUL 29 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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## INTEREST OF THE *AMICUS CURIAE*

The Freedom From Religion Foundation, Inc. is a nationally recognized nonprofit charitable and educational corporation existing under the laws of the State of Wisconsin. The Foundation is the principal spokesperson for promoting the constitutional separation of church and state on behalf of atheists, agnostics, and nonbelievers. The issues presented in the instant case are of great importance to the Foundation and its constituency.[1]

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. There is no parent or subsidiary company to be listed.

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## SUMMARY OF THE ARGUMENT

The phrase "under God" in the pledge of allegiance is an affront to the many loyal Americans who do not believe in or worship god. It also cheapens religion for those who have faith and subscribe to organized religion. Without question, the phrase violates the Establishment Clause of the United States Constitution. The Court should grant petitioner Newdow's request to declare the phrase unconstitutional in both school and non-school settings.

## ARGUMENT

For fifty years the phrase "under God" in the pledge of allegiance has been a major burr in the saddle of millions of Americans who do not believe in or worship god. These Americans maintain that this is a secular nation formed under the laws of men, not the commands of a divinity – a nation that guarantees the right of every citizen to believe in a god, in multiple gods, or in no gods at all. *Everson v. Board of Education*, 310 U.S. 1, 15 (1947).

There are an estimated 29.5 million adult citizens in the United States who do not believe in god or adhere to organized religion. This constitutes more than 14% of our adult population and the number is growing. THE GRADUATE CENTER, CUNY, AMERICAN RELIGIOUS IDENTIFICATION SURVEY, KEY FINDINGS, p. 3 of 20 (2002). The U.S. military includes many such nonadherents, and the oft-cited adage that "there are no atheists in foxholes" is untrue. Many atheists have faced death in World Wars I and II, Korea, Vietnam, and subsequent conflicts.

It is an affront to all these citizens that their country's official pledge of allegiance includes specific reference to a divinity. Many of them want to affirm their devotion to America but they cannot, in conscience, declare loyalty to a god in which they do not believe. As a consequence, they are seen as outsiders in their own country, even when they have risked their lives to defend it.

The increasing intrusion of religion into this nation's body politic is a matter that needs attention by this Court. Not only is this intrusion in conflict with the foundation upon which this society's principles are based, but it is also causing major divisions among our citizenry. According to the ZOGBY/REUTERS INTERNATIONAL POLL (August 13, 2002), there is a growing climate of intolerance in this country toward atheists and nonbelievers. Government endorsements of religion exacerbate this problem by creating the impression that god is an integral part of our system of government and that rejecting this notion is tantamount to treason. It has thus become fashionable to condemn those who refuse to recite a formal pledge to god as "unAmerican."

"Under God" in the pledge of allegiance is also disrespectful to many thoughtful, churchgoing Americans who believe that the merger of god and country cheapens the religion to which they subscribe. The phrase is anathema to many devoutly religious citizens who believe in Allah or some other divinity not known to them as "god." The United States is a "melting pot" of diverse cultures and religions. It is, indeed, "unAmerican" to impose upon the society a Judeo-Christian god as a condition of pledging fealty to one's country.

It is not enough to say that those who, in conscience, cannot tolerate the oath to god are free to omit the objectionable

phrase from their recitation of the pledge, or stand away and say no pledge at all. A major purpose of the pledge is to unite Americans as "one nation indivisible" in a common bond of respect for flag and country. God has no part in this.

The phrase "under God" in the pledge is an egregious violation of the doctrine, well-settled by this Court, that government may not promote or endorse religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The instant case presents the Court with an opportunity to affirm this logic and restore the pledge of allegiance to the prominence it once had as a uniting vehicle for all Americans by declaring the phrase "under God" to be unconstitutional.

## CONSENT OF PARTIES

This brief is accompanied by the written consent of the parties pursuant to Supreme Court Rule 37.2(a).

## CONCLUSION

Wherefore, it is respectfully submitted that this Court grant the Petition for a Writ of Certiorari herein and that it adjudicate the constitutionality of the phrase "under God" in both school and non-school settings.

Respectfully submitted,

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July, 2003

Supreme Court, U.S.
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No. 03-0007

IN THE

# Supreme Court of the United States

THE REV. DR. MICHAEL NEWDOW, *Petitioner*,

v.

UNITED STATES CONGRESS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN OPPOSITION TO CERTIORARI OR, ALTERNATIVELY, IN SUPPORT OF VACATUR

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## QUESTION PRESENTED

In deciding petitioner's appeal, the Ninth Circuit did not address petitioner's claim that the federal Pledge statute, and the recitation of the Pledge under official auspices in various settings, violates his rights as a citizen and taxpayer under the Establishment Clause.

The question presented is:

Whether the Court should review the citizen and taxpayer claims of petitioner that the Ninth Circuit did not address, including his Article III standing to assert those claims and the sovereign immunity issue they present.

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## INTEREST OF AMICUS [1]

Americans United for Separation of Church and State is a 75,000-member not-for-profit organization dedicated to defending religious diversity and church-state separation. It advances these goals by speaking out through the media, public forums, and other channels; mobilizing Americans at the grassroots level and through state and regional chapters; advocating for separation of church and state in Congress and state legislatures; and participating in litigation. Americans United was the respondent in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In the past thirty years it has filed or joined amicus briefs in numerous Establishment Clause cases. *E.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Americans United has filed an amicus brief in vided Nos. 02-1574 & 02-1624.

## STATEMENT

In his complaint, Newdow alleged Establishment Clause injuries to himself (1) as a parent, as a result of the Pledge policies of his daughter's school district (EGUSD) and another school district (SCUSD), and (2) as a citizen and taxpayer, as a result of the federal Pledge statute, 4 U.S.C. § 4, the recitation of the Pledge under official auspices in various settings, and the publi-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

cation of the Pledge in government documents. See Pet. 3-5. The particulars of Newdow's citizen and taxpayer claims are set forth in the margin.[2] Newdow also alleged that recitation of the Pledge under official auspices violates three provisions of the California Constitution. See Pet. 5 n.1; Compl. ¶¶ 67, 107-08, 118-19. Those provisions are reproduced in the Appendix below.

The school districts moved to dismiss Newdow's complaint, contending, among other things, that Newdow had failed to state a claim and that the Eleventh Amendment barred his claims against them. Their motion was referred to a magistrate, who undertook with the consent of the parties to decide the merits without reaching the school districts' Eleventh Amendment defense or any affirmative defenses that might be asserted by the federal defendants. ER 189-99. Characterizing Newdow's complaint only as challenging the school districts' Pledge policies—and making no mention of Newdow's claims as a citizen and taxpayer or his state-law

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[2] Newdow alleged Establishment Clause injury to himself as a citizen in having to endure the existence of the federal Pledge statute, *e.g.*, Compl. ¶ 62, and the recitation of the Pledge in his presence under official auspices (when he accompanies his daughter to class, *id.* ¶ 80, and when he attends EGUSD and SCUSD meetings, *id.* ¶¶ 85-87). He also alleged that the school districts' Pledge policies effectively foreclose him from serving on the district school boards, *id.* ¶¶ 88-90, and from working for the districts as a teacher, *id.* ¶¶ 120-21. As a taxpayer, Newdow alleged Establishment Clause injury from the expenditure of public funds to pay for the salaries of government employees who recite the Pledge as part of their official duties; to pay for the recitation of the Pledge in public schools; to pay for official events at which the Pledge is recited; and to pay for the printing of the United States Code and other government documents containing the Pledge. *Id.* ¶¶ 109-19.

claims—the magistrate concluded that "the Pledge does not violate the Establishment Clause," and recommended that the complaint be dismissed. App. 111a-12a. The district court adopted the magistrate's report and dismissed the complaint. App. 110a. The Ninth Circuit stated that the district court dismissed the complaint "on the basis of its holding that the school district's policy did not violate the First Amendment." App. 18a.

Newdow appealed the dismissal of his complaint, including his citizen and taxpayer claims and his state-law claims. See Newdow Br. 8 n.12, 15-16, 21-22, 50-51, 54-56, 62; see also US Br. 3-4, 5-7.

In its amended decision, the Ninth Circuit found that Newdow had standing as a parent to challenge EGUSD's Pledge policy, App. 7a, see also *id.* 95a-98a, and it invalidated the policy as impermissibly coercive, App. 11a-17a. The court, however, "decline[d] to reach" the constitutionality of the federal Pledge statute, App. 18a, and it did not address Newdow's other citizen and taxpayer claims or his state-law claims. The court made no finding with respect to Newdow's Article III standing to assert his citizen and taxpayer claims; it also made no finding with respect to the sovereign immunity issue presented by his assertion of an Establishment Clause claim against the United States.[3] The court vacated the dis-

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[3] See Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 5-6 (discussing the sovereign immunity issue). The Ninth Circuit held that Newdow lacked standing to challenge SCUSD's Pledge policy because his daughter did not attend school in that district. App. 7a-8a. With respect to Newdow's challenge to the federal Pledge statute, the court held that the President was not an appropriate defendant and that the Speech and Debate Clause barred Newdow's claim against Congress. App. 5a.

trict court's dismissal of Newdow's complaint only with respect to his challenge as a parent to EGUSD's Pledge policy, App. 18a, leaving undisturbed and unaddressed the district court's dismissal of Newdow's other claims.

Newdow now seeks review of the citizen and taxpayer claims that the Ninth Circuit did not address, including his Article III standing to assert those claims and the sovereign immunity issue presented by his challenge to the federal Pledge statute.

## ARGUMENT

### I. THE COURT SHOULD DECLINE TO REVIEW NEWDOW'S ESTABLISHMENT CLAUSE CLAIMS AS A CITIZEN AND TAXPAYER BECAUSE THOSE CLAIMS WERE NOT ADDRESSED BELOW.

The Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court," *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988), consistent with its general practice of declining to consider issues that were not decided in the first instance by the court below. See, *e.g.*, *Lee* v. *Kemna*, 534 U.S. 362, 387-88 (2002) ("We ordinarily 'do not decide in the first instance issues not decided below.'") (quoting *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . . ."); Robert L. Stern *et al.*, SUPREME COURT PRACTICE 419 (8th ed. 2002) ("The Court does not sit to resolve issues that might have been but were not considered below.").

This case is particularly ill-suited for review because, in order to reach the merits of Newdow's citizen and taxpayer claims, including his challenge to the federal

Pledge statute, the Court would first have to decide two other issues that both courts below also did not address—Newdow's Article III standing to assert those claims, see *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 471-73 (1982), and the sovereign immunity issue presented by Newdow's assertion of an Establishment Clause claim against the United States, see *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947) (sovereign immunity bars suit against United States absent express waiver by Congress). The Court must decide those issues first because they go to its jurisdiction and that of the courts below to entertain Newdow's claims. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997). The petition therefore potentially requires the Court to decide not one but three issues not decided below. Accordingly, the petition should be denied.[4]

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[4] Newdow does not ask the Court to hold EGUSD's Pledge policy invalid by reason of the invalidity of the federal Pledge statute. The Ninth Circuit properly invalidated EGUSD's policy on the narrower ground that the policy was impermissibly coercive. App. 11a-17a. For this reason the first question in the petition of the United States in No. 02-1574 is far too broadly stated. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (federal courts should "never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (internal quotation marks omitted); *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

## II. ALTERNATIVELY, THE COURT SHOULD VACATE AND REMAND FOR CONSIDERATION OF NEWDOW'S CLAIMS BY THE COURT OF APPEALS IN THE FIRST INSTANCE.

A lower court's failure to address a party's claim is not a "compelling" reason for granting review. See Rule 10. If the Court nevertheless concludes that the Ninth Circuit's failure to address Newdow's citizen and taxpayer claims warrants its intervention, the Court should vacate the Ninth Circuit's judgment and remand the case to that court for its consideration of those claims in the first instance. Such a disposition would be consistent with the Court's general practice of not deciding in the first instance matters not addressed below. See, *e.g.*, *Lee*, 534 U.S. at 387-88 (vacating and remanding so that court of appeals could decide petitioner's Due Process claim in the first instance); *Alexander* v. *United States*, 509 U.S. 544, 559 (1993) (vacating and remanding so that court of appeals could decide in the first instance whether challenged federal statute violated the Excessive Fines Clause); *Ins. Co.* v. *Ben Cooper, Inc.*, 498 U.S. 964 (1990) (mem.) (vacating and remanding so that court of appeals could decide jurisdictional issue in the first instance); *Escambia County* v. *McMillan*, 466 U.S. 48, 51-52 (1984) (per curiam) (vacating and remanding so that court of appeals could decide in the first instance a statutory question that could avoid the need to reach a constitutional issue).

If vacatur is ordered, the Court should direct the Ninth Circuit, before it reaches the federal constitutional issue, to consider Newdow's claim that recitation of the Pledge under official auspices violates the California Constitution, see *supra* at 2 & n.2; *infra* Appendix, including whether Newdow is permitted to assert that claim in this federal court action. Disposition of New-

dow's state-law claim on the merits, if the Ninth Circuit concludes that Newdow may assert that claim here, could avoid or limit the need to decide federal constitutional issues here and could also moot vided Nos. 02-1574 & 02-1624. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117-18 & n.28 (1984) (stating general rule, qualified by Eleventh Amendment, that federal court should decide a case on state law grounds if doing so would avoid federal constitutional issue); *Schmidt* v. *Oakland Unified Sch. Dist.*, 457 U.S. 594, 594-95 (1982) (per curiam) (vacating and remanding so that court of appeals could consider in the first instance a state-law question that might avoid need to reach a federal constitutional issue); *Hagans* v. *Lavine*, 415 U.S. 528, 546 (1974) ("The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims.").

As with the novel and unsettled state-law question on which Newdow's Article III standing as a parent depends in Nos. 02-1574 & 02-1624, a GVR directing certification to the California Supreme Court of this state-law question (whether recitation of the Pledge under official auspices violates the California Constitution) is also an option here, if the Ninth Circuit should conclude that Newdow is permitted to assert his state-law claim in this action. See Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 8-9 & n.5.[5]

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[5] In its amicus brief in Nos. 02-1574 & 02-1624, Americans United has suggested the precise question to be certified to the California Supreme Court with respect to Newdow's standing as a parent under California law to challenge EGUSD's Pledge policy notwithstanding the custodial parent's consent to the policy. Br. Amicus Curiae of Americans United, Nos. 02-1574 & 02-1624, at 20.

## CONCLUSION

The petition should be denied. Alternatively, the Court should grant the petition, vacate the Ninth Circuit's judgment, and remand the case for consideration of Newdow's citizen and taxpayer claims, including consideration or certification of Newdow's state-law claims.

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# APPENDIX

## CALIFORNIA CONSTITUTIONAL PROVISIONS RELIED ON BY PETITIONER

**Article I, § 4:**

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

**Article IX, § 8:**

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

**Article XVI, § 5:**

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any

city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.